



## Santa Clara Law Review

Volume 30 | Number 4

Article 3

1-1-1990

# Employment Discrimination against Overweight Individuals: Should Obesity be a Protected Classification

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### Recommended Citation

Donald L. Bierman Jr., Comment, *Employment Discrimination against Overweight Individuals: Should Obesity be a Protected Classification*, 30 SANTA CLARA L. REV. 951 (1990).

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## COMMENTS

### **EMPLOYMENT DISCRIMINATION AGAINST OVERWEIGHT INDIVIDUALS: SHOULD OBESITY BE A PROTECTED CLASSIFICATION?**

#### I. INTRODUCTION

Consider that you have just completed an employment related<sup>1</sup> interview. Your qualifications are equal to, or better than, any other applicant. The only difference between you and the other candidates is that you are obese.<sup>2</sup> What are your chances of obtaining this job? What should they be?<sup>3</sup>

There are three viewpoints from which to analyze the protection of obese individuals from employment related discrimination. The first category includes those individuals who are handicapped or disabled because they are obese and they also have a related medical condition.<sup>4</sup> Much of the litigation surrounding discrimination based on obesity attempts to classify obesity as a handicap. These litigants generally bring suit under federal or state laws that protect handicapped or disabled individuals from employment discrimination based on the handicap. Since most of these obese persons had a medical condition related to their obesity, they fell within a handicap statute more easily than if they had not suffered from a related medical condition.

The second viewpoint considers those individuals who do not have a related medical condition but claim that they are handicapped on the basis of their obesity alone.<sup>5</sup> These indi-

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1. For purposes of this comment, "employment related" includes interviews or consideration for new employment, promotion or transfer.

2. See *infra* notes 32-48 and accompanying text.

3. Discrimination based on obesity is regularly becoming more publicized and being brought before the general public. This was evidenced by the fact that it was the subject of an episode of *LA Law*. *LA Law: Beauty and Obese* (NBC television broadcast, Feb. 11, 1988) (Production number 5K13).

4. See *infra* notes 71-80 and accompanying text.

5. See *infra* notes 81-104 and accompanying text.

viduals cannot demonstrate obesity coupled with a related medical condition, but question whether obesity, in and of itself, should qualify as a handicap for purposes of handicap discrimination. When the handicap statutes were held to apply, these overweight individuals were protected from discrimination, so long as they were able to perform the necessary job duties.

When the handicap statutes are held inapplicable, a third possible basis exists for protecting obese persons from employment related discrimination. This third view is that obesity should be a protected classification as a matter of civil right, and discriminating against obese persons should be treated similarly to race or sex discrimination.<sup>6</sup>

This comment will focus on these three viewpoints.<sup>7</sup> It will examine 1) what constitutes a handicap, 2) what obesity means and 3) case treatment of obese individuals. The comment then proposes a general solution to the question of discrimination against obese persons.

## II. BACKGROUND

### A. *History of Employment Relationships*

The California Labor Code considers employment to be "at will."<sup>8</sup> This means that either party may terminate the employment relationship at any time and for any reason. Historically, several exceptions to "at will" employment have developed in various courts and legislatures.

For instance, many state courts have held that certain conduct by employers violates public policy and acts to void the "at will" premise. Terminating employees for reasons such as refusing to commit perjury,<sup>9</sup> filing workers compensation claims,<sup>10</sup> refusing to perform a criminal act,<sup>11</sup> and

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6. See *infra* notes 105-12 and accompanying text.

7. This comment does not discuss handicap or disability in the context of Workers Compensation claims or Social Security Disability Benefits.

8. "An employment, having no specified term, may be terminated at the will of either party on notice to the other," CAL. LAB. CODE § 2922 (West 1980 & Supp. 1988).

9. *Petermann v. Teamsters Local 396*, 174 Cal. App. 2d 184, 344 P.2d 25, 38 Lab. Cas. (CCH) P65,861 (1959), *aff'd*, 214 Cal. App. 2d 155, 29 Cal. Rptr. 399 (1963).

10. *Sventko v. Kroger Co.*, 69 Mich. App. 644, 245 N.W.2d 151 (1976).

11. *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 610, P.2d 1330, 164

protesting about smoking induced workplace hazards<sup>12</sup> have been held to violate public policy. Courts have also held that an employee with a long period of service, and with good performance, may not be terminated without just cause.<sup>13</sup> One can infer from these cases that, although statutes provide for an "at will" employment relationship, employers may not terminate employees for absolutely any reason, and factors such as public policy and fairness will be evaluated by the courts.

Statutes have also placed restrictions on the reasons that employers may use when making employment related decisions. The Civil Rights Act of 1964 protects employees from discrimination on the basis of race, religion, national origin, sex or age.<sup>14</sup> The Age Discrimination in Employment Act prohibits discrimination based on age.<sup>15</sup> The Rehabilitation Act of 1973 prohibits discrimination based on a handicap.<sup>16</sup> These statutes indicate that membership in any one of the protected classes is not a valid reason upon which to base an employment related decision.

Many states have similar statutes prohibiting discrimination in employment.<sup>17</sup> California and New York, being two of the most populated states, have been the situs of much employment discrimination litigation. This comment cites the laws of these two states as demonstrating reasonable legislation and samples of proscribed discrimination. The California codes prohibit discrimination on the basis of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex,<sup>18</sup> or age.<sup>19</sup> New

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Cal. Rptr. 839 (1980).

12. *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290, 188 Cal. Rptr. 159 (1982).

13. *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal. Rptr. 917 (1981) (The court stated that a long service record coupled with a good record of performance may create an implied contract to terminate only when just cause exists.).

14. 42 U.S.C. § 2000(e) (1982 & Supp. V 1988).

15. 29 U.S.C. §§ 621-634 (1982 & Supp. V 1988).

16. *Id.* §§ 701-796.

17. A. LARSON & L. LARSON, *EMPLOYMENT DISCRIMINATION*, Vol. 1 §§ 9.00-9.70 (gender statutes), Vol. 3A § 107.30, at 22-78 (handicap statutes), § 120.00 (wrongful termination statutes) (1982 & Supp. 1988).

18. CAL. GOV'T CODE § 12940 (West 1980 & Supp. 1988). *See also id.* § 12920 for a discussion of California's public policy regarding employment discrimination.

19. *Id.* § 12920.

York laws prohibit discrimination on the basis of age, race, creed, color, national origin, sex, disability, marital status,<sup>20</sup> and religion.<sup>21</sup>

### B. *Handicap Definitions*

The Rehabilitation Act of 1973 defines a handicapped individual<sup>22</sup> as someone who "(i) has a physical or mental impairment<sup>23</sup> which substantially limits one or more of such a person's major life activities,<sup>24</sup> (ii) has a record of such impairment, or (iii) is regarded as having such an impairment."<sup>25</sup> Courts have held that before an individual can invoke the protection afforded by this statute, he or she must demonstrate that the job can be performed adequately despite the handicap.<sup>26</sup> Although some statutes require employers to make reasonable accommodations for handicapped individuals,<sup>27</sup> the validity of a negative employment decision has rested on whether the individual can adequately perform the job after reasonable accommodations have been implemented.<sup>28</sup>

In addition to federal legislation in the handicap area, forty-nine states have enacted statutes prohibiting discrimina-

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20. N.Y. EXEC. LAW § 296(1)(a) (McKinney 1982 & Supp. 1990).

21. *Id.* § 296(10)(a).

22. 29 U.S.C. § 706(7)(B) (1982 & Supp. V 1988). *See also* 29 C.F.R. § 1613.702(a) (1989).

23. The Act defines physical or mental impairment very broadly to include any physiological, neurological, musculoskeletal or sensory disorder. Mental impairment includes retardation, emotional or mental illness and learning disabilities. *Id.* § 1613.702(b).

24. The Act defines major life activities to include "caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." *Id.* § 1613.702(c).

25. The Act states that being regarded as having an impairment means being treated by an employer as if one's major life activities were impaired, whether or not a physical or mental impairment substantially limits major life activities. *Id.* § 1613.702(e).

26. *Prewitt v. United States Postal Serv.*, 662 F.2d 292, 307 (5th Cir. Unit A Nov. 1981).

27. 41 C.F.R. § 60-741.1 (1989) requires affirmative action from government contractors in the employment of qualified handicapped individuals.

28. *Id.* *E.E. Black Ltd. v. Marshall* 497 F. Supp. 1088 (D. Haw. 1980); *see* 41 C.F.R. § 60-741.6(c) (1989), *see also* 29 C.F.R. § 1613.704 (1989). Some examples of reasonable accommodations might include wheel chair ramps, special lamps for the sight impaired, amplified telephones for the hearing impaired and flexible time off for religious customs.

tion based on handicap or disability.<sup>29</sup> These laws are generally similar to the federal statute discussed above. California, for example, prohibits discrimination on the basis of a physical handicap.<sup>30</sup> The California code broadly defines handicap to include impairment of sight, hearing, speech, physical ability, or any other impairment requiring special education or service.<sup>31</sup> The California code also uses impairments of major life activities,<sup>32</sup> a record of having a physical handicap,<sup>33</sup> and being regarded as having a physical handicap<sup>34</sup> as factors in determining whether a person is handicapped.

New York is another example of a state that broadly defines disability and includes any physical, mental or medical impairment preventing normal bodily function. The New York statute qualifies the disability by stating that the disability must not prevent the individual from performing the job in a reasonable manner.<sup>35</sup> As with the California and Federal legislation, the New York code includes having a record of impairment and being regarded as having such impairment as determinants in concluding that a person is handicapped.<sup>36</sup>

State and federal codes are generally in agreement on what constitutes basic handicap treatment. If an individual qualifies as handicapped, and the handicap does not interfere with job performance, the person is protected from employ-

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29. A. LARSON & L. LARSON, *EMPLOYMENT DISCRIMINATION*, Vol. 3A § 107.310, at 22-118 (1990 & Supp. 1990). Delaware is the only state without a statute prohibiting discrimination based on a handicap or disability. The District of Columbia also prohibits discrimination based on handicap or disability.

30. CAL. ADMIN. CODE tit. 2, § 7293.5 (1988).

31. *Id.* § 7293.6. *See also* CAL. GOV'T CODE § 12926(h) (West 1980 & Supp. 1988).

32. Major life activities include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. CAL. ADMIN. CODE tit. 2, § 7293.6(f) (1988).

33. A record can be written or unwritten history of having a physical handicap. *Id.* § 7293.6(g).

34. Being regarded as having a physical handicap includes any condition treated by an employer as a handicap or any condition that limits major life activities due to an employer's attitude. *Id.* § 7293.6(h).

35. A disability is "a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of normal bodily function . . . which do not prevent the complainant from performing in a reasonable manner . . . ." N.Y. EXEC. LAW § 292(21) (McKinney 1982 & Supp. 1990).

36. *Id.*

ment related discrimination. To examine whether an obese person is handicapped, this comment next focuses on the meaning of obesity.

### C. Obesity

Being obese generally means that a person is extremely fat or corpulent.<sup>37</sup> Medical evidence suggests that three levels of obesity exist.<sup>38</sup> The first level is simply overweight and means any weight exceeding the ideal weight defined in tables published by insurance companies.<sup>39</sup> The ideal weight is the weight associated with the lowest mortality rates for various height and weight combinations. Individuals in this first category of obesity would probably not be considered fat or obese by the non-medical community.

The second level of obesity begins when a person is 20% above the ideal weight and is referred to as medically significant obesity. Significant obesity ranges from 20% to 30% above the ideal weight.<sup>40</sup> This level of obesity probably represents the point where a person would be considered fat by a non-medical person. The third level of obesity is referred

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37. AMERICAN HERITAGE DICTIONARY 856 (2nd college ed. 1985); WEBSTER'S NEW WORLD DICTIONARY 934 (3rd college ed. 1988); VII THE OXFORD ENGLISH DICTIONARY 12 (1978); STEDMAN'S MEDICAL DICTIONARY 973 (5th Unabridged Lawyer's ed. 1982).

38. Straw, *The Dilemma of Obesity*, 72 POSTGRADUATE MED. No. 1, 121-26 (1982).

39. *Id.*

40. *Id.* See also Straw, *Obesity-A Killer Disease?*, 22 J. FAM. PRAC. No. 5, 461 (1986). This article includes the 1983 Metropolitan Life Insurance table showing the following weights, where significant obesity begins for various height and sex combinations:

Height	Women	Men
4 ft 10 in	136	
5 ft 0 in	143	
5 ft 2 in	150	163
5 ft 4 in	157	168
5 ft 6 in	164	174
5 ft 8 in	172	181
5 ft 10 in	179	192
6 ft 0 in	186	196
6 ft 2 in		205
6 ft 4 in		215

These weights represent 120% of the desirable weight for various height and weight categories.

to as morbid obesity. Morbid obesity is weight that is either one hundred pounds over the ideal, or twice the ideal.<sup>41</sup>

Persons who are either significantly obese or morbidly obese are considered to be subject to an "established health risk."<sup>42</sup> One can reasonably assume that persons within these two categories have experienced more prejudice and discrimination than persons who are simply overweight.

Definitions of obesity make no mention of reasons or causes for the condition. Obesity is often considered to be a voluntary indulgence.<sup>43</sup> There are, however, several medical or psychological reasons that may cause an individual to be obese. For example, obesity may relate to genetic composition, brain disorders, medical or psychological disorders.<sup>44</sup> Frequently, however, the underlying cause of the obesity is not understood or explainable.<sup>45</sup> While it is estimated that twenty percent of the population is obese,<sup>46</sup> few of these people have an identifiable medical disorder causing the obesity.<sup>47</sup> Many research studies have demonstrated that obese persons do not consume more calories than non-obese persons. Therefore, causes surrounding metabolism have been investigated. These studies have failed to establish any conclusive relationship between an overweight condition and metabolism.<sup>48</sup> This may seem counter intuitive to the lay person, however some medical experts suggest that obesity is largely untreatable and that weight is regulated by an internal control mechanism similar to that which controls body temperature. It is also believed that the body strongly resists deviation from its set weight.<sup>49</sup>

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41. Straw, *supra* note 38, at 121.

42. Straw, *supra* note 40, at 461.

43. See generally Comment, *Voluntary Handicaps - Should Drug Abuse, Alcoholism and Obesity be Protected by Pennsylvania's Anti-Discrimination Laws?*, 85 DICK. L. REV. 475 (1981); Comment, *The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?*, 29 UCLA L. REV. 947, 949 (1982).

44. Comment, *The Rehabilitation Act of 1973: Protection for Victims of Weight Discrimination?*, 29 UCLA L. REV. 947, 949-50 (1982).

45. *Id.*

46. Telephone discussion with William E. Straw, MD, Department of Family Practice, Palo Alto Medical Foundation, 300 Homer Avenue, Palo Alto, Cal. 94301 (Sept. 15, 1988).

47. Straw, *supra* note 38 at 122.

48. Straw, *supra* note 38 at 122.

49. Straw, *supra* note 38 at 121.



Obesity is closely associated with medical diseases such as diabetes, hypertension, stroke, and heart failure.<sup>50</sup> Obesity also increases the chance of gallstones, osteoarthritis, hernias, menstrual disorders, depression, and several forms of cancer.<sup>51</sup> While an association between obesity and various medical conditions has been found, ambiguities remain as to whether a causal relationship exists between the obesity and the medical condition.<sup>52</sup> Evidence indicates that mortality rates are higher among those persons within the morbidly obese category than any other category of obesity.<sup>53</sup> This implies that, even though a causal relationship between obesity and medical conditions cannot be proven, obesity adversely affects longevity.

#### D. *Obesity and Discrimination*

There is no question that society in general discriminates against overweight people. Such discrimination frequently occurs in the employment arena. A recent survey was conducted among members of the National Association to Aid Fat Americans (NAAFA).<sup>54</sup> The purpose of this survey was to determine NAAFA members' familiarity and experience with employment related discrimination.<sup>55</sup> Responses to the survey were received by 367 women and 78 men. The respondents were categorized by sex and then by either "non-fat," "moderately fat" or "fat." Non-fat was defined as less than 19% over average weight, moderately fat were those who ranged between 20% and 49% above average weight and fat were those who were 50% or more above the average weight.<sup>56</sup>

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50. Straw, *supra* note 38 at 122.

51. Straw, *supra* note 38 at 122.

52. Straw, *supra* note 38 at 122.

53. Straw, *supra* note 38 at 122.

54. The National Association to Aid Fat Americans is a non-profit organization founded in 1969 dedicated to improving the quality of life of fat people. The organization provides support and education to its members as well as to the general public. NAAFA is comprised of more than 20 chapters throughout the United States and is headquartered in Sacramento, California. The headquarters address is P. O. Box 188620 Sacramento, California, 95818.

55. Rothblum, Brand, Miller, Oetjen, *Results of the NAAFA Survey on Employment Discrimination* (Fall 1987) (unpublished summary).

56. *Id.* at 2.

Sixty percent of the fat women in the survey believed that they had been refused a job because of their weight. Forty percent of the fat men surveyed also indicated that they had experienced job discrimination because of their weight. The persons in the fat group had also been denied promotions or raises and over 25% stated that they had been denied benefits such as health or life insurance, because of their weight. Some respondents indicated that they had been charged more for insurance because of their weight.<sup>57</sup>

Over two-thirds of the fat respondents indicated that they had been questioned about their weight or urged to lose weight by their employers. Only 30% of the moderately fat people and only 10% of the non-fat group experienced such treatment. Respondents stated that employers believed that fat people lacked energy, would be poor role models or were mentally handicapped. The survey also indicated that the frequency of employment discrimination might be understated because the discrimination was frequently only suspected and unprovable.<sup>58</sup>

In terms of annual earnings, little difference existed between the three groups of respondents. However, a difference was discovered between the men and the women in the survey. The difference was attributed to the males having been in the labor force for a longer period of time than the females. The fat group, however, felt that they tended to be overqualified for the jobs that they held. Additionally, fat people were generally employed on jobs of lower prestige than the other respondents.<sup>59</sup>

Other surveys have indicated that over 24% of middle and top managers said that fifteen pounds of excess weight would have a "somewhat negative" impact on employment opportunities. At fifty pounds of added weight, 43% of the managers thought it would be "somewhat negative" and 27% believed that it would be "very negative."<sup>60</sup> Estimations have also been formulated that each pound of fat could cost an employee \$1,000 in annual salary at the executive level of employment.<sup>61</sup>

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57. *Id.* at 3.

58. *Id.*

59. *Id.*

60. Zetlin, *Sizable Problems*, SAVVY, Aug. 1988, at 22.

61. B. WOLMAN, *PSYCHOLOGICAL ASPECTS OF OBESITY: A HANDBOOK* 139

### E. *Legislative Treatment of Obesity*

Few legislatures have assertively considered the issue of obesity in terms of either handicaps or discrimination. Michigan remains the only state to have codified a prohibition against discrimination on the basis of weight. The Michigan civil rights codes have added both height and weight to the standard protected classes of religion, race, color, national origin, age, sex and marital status.<sup>62</sup>

California codes regulating discrimination in employment do not specifically prohibit discrimination based on obesity. The code section that applies to the California Civil Service system does mention obesity, but specifically excludes obesity, or health impairment caused by obesity, from the definition of physical handicap for civil service employment purposes.<sup>63</sup> Suggestions have been made, however, that the broadly written California Administrative Code<sup>64</sup> can be construed to protect obese persons under the section discussing persons regarded as having a handicap.<sup>65</sup>

Other states and the federal government have not addressed whether obesity is a handicap or whether obesity should be protected under a general civil rights theory. The District of Columbia, however, while not addressing obesity specifically, does prohibit discrimination based on personal appearance.<sup>66</sup> This statute has not been used to specifically prohibit obesity discrimination, but has been invoked to proscribe discrimination such as that based on style of dress.<sup>67</sup>

While legislatures have not been appreciably assertive in addressing the issue of discrimination based on obesity, some courts have examined the question.

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(1982).

62. MICH. COMP. LAWS ANN. § 37.2102 (West 1985 & Supp. 1988).

63. Physical handicap does not include obesity or health impairment caused by a person's obesity. CAL. GOV'T CODE § 19702(c) (West 1980 & Supp. 1990).

64. CAL. ADMIN. CODE tit. 2, § 7293.6 (1988).

65. Comment, *supra* note 44, at 969.

66. D.C. CODE ANN. § 1-2501 (1987 & Supp. 1989).

67. *Atlantic Richfield Co. v. Dist. of Columbia Comm'n on Human Rights*, 515 A.2d 1095 (D.C. 1986).

### F. *Judicial Treatment of Obesity*

Several courts have examined the issue of discrimination against the obese. Most courts have examined whether or not obesity is a handicap and have found that it is not.<sup>68</sup> A few courts have held that obesity is a handicap,<sup>69</sup> and several cases have not considered the handicap issue at all.<sup>70</sup>

#### 1. *Cases Holding That Obesity is not a Handicap*

Most of these cases have examined whether or not the obesity in question was a qualified handicap. Qualified handicap means that a handicap or disability exists, but does not interfere with job performance. These cases generally construe applicable laws narrowly in determining whether or not a handicap exists. A majority of these cases hold that obesity, absent some other factor, is not a handicap. Additionally, if the handicap impairs adequate job performance, it is not a qualified handicap.

*Thomas J. Lipton, Inc. v. N. Y. S. Human Rights*<sup>71</sup> is a New York case where a woman's condition was not a qualified handicap. The case involved a woman who was five feet seven inches tall, weighed over 300 pounds and also had high blood pressure. The woman was denied re-employment because her obesity had hindered her job performance during her previous employment and was considered likely to do so in the future.<sup>72</sup> The court found that the woman's obese condition was directly related to her ability to perform her job. Because her performance was directly affected by her obesity, the employer had not discriminated against her on the basis of a handicap.<sup>73</sup>

Two years later, in *Greene v. Union Pac. R.R. Co.*,<sup>74</sup> an individual in the state of Washington was denied a transfer to a physically demanding job category for a railroad.<sup>75</sup> The

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68. See *infra* notes 71-92 and accompanying text.

69. See *infra* notes 93-104 and accompanying text.

70. See *infra* notes 105-12 and accompanying text.

71. 67 A.D.2d 1029, 413 N.Y.S.2d 233 (1979).

72. *Id.*

73. *Id.*

74. 548 F. Supp. 3 (W.D. Wash. 1981).

75. *Id.* at 5.

employer denied the transfer because the employee was very overweight, had high blood pressure, and had advanced osteoarthritis of the spine. The railroad believed that this combination of conditions would create a less safe employee who would claim more insurance benefits than an employee without similar physical conditions.<sup>76</sup>

The court held that the railroad was under a business duty to consider the impact of the plaintiff's conditions on his ability to perform the job with sufficient safety toward himself, as well as, to other employees and the general public. The court found that the height and weight requirements were bona fide occupational qualifications.<sup>77</sup> Whether a bona fide occupational qualification exists will generally depend on the specific facts and circumstances involved.<sup>78</sup> However, the judge also considered whether the plaintiff's obesity was a handicap under the Washington statutes. The court ruled that no handicap was present, since the obesity was considered to be alterable and not an immutable<sup>79</sup> or unchangeable condition such as blindness or lameness might be.<sup>80</sup>

The next case to examine the issue of obesity as a handicap was *Philadelphia Electric Co. v. Commonwealth of Pennsylvania Human Relations Comm'n.*<sup>81</sup> Here the plaintiff was female, five feet eight inches tall and weighed 341 pounds. After successfully passing pre-employment testing, the plaintiff underwent a physical examination by the company's medical department. The company's physician classified her as unsuited for employment because of her obesity, which significantly exceeded the desirable weight of 140 pounds according to the company's height and weight charts.<sup>82</sup> The Human Relations Commission found that morbid obesity was a handicap or disability within the Pennsylvania act and that the plaintiff's obesity did not interfere with her ability to per-

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76. *Id.*

77. *Id.*

78. *Id.*

79. WEBSTER'S NEW WORLD DICTIONARY 675 (3rd college ed. 1988) defines immutable as unchangeable or unalterable.

80. *Greene*, 548 F. Supp. at 5.

81. 68 Pa. Commw. 212, 448 A.2d 701 (1982).

82. The company used published life insurance tables that describe desirable weight and height combinations. *Id.* at 214-15, 448 A.2d at 703.

form the job sought. Therefore, the employer had unlawfully discriminated against her.<sup>83</sup>

The appeals court overturned the commission's finding of unlawful discrimination and held that morbid obesity, alone, is not a handicap or disability.<sup>84</sup> The court's rationale was that the examining physician had found nothing physically wrong with the plaintiff and that she was not prevented from performing her duties. Also, the plaintiff herself did not believe that her weight would prevent her from completing a regular work day. Since the obesity did not impair job performance it was not a job related handicap.<sup>85</sup>

The court went further than analyzing whether the specific facts in this case justified a finding of unlawful handicap discrimination and stated that employers may be selective in their hiring practices. Not all discrimination is unlawful. Employers have a right to control productivity by discriminating against those individuals or job applicants with high potential for absenteeism and low productivity.<sup>86</sup> Lawful discrimination can only occur when the policy, procedure, or practice is applied uniformly and reasonably.<sup>87</sup>

Other courts have continued to look at whether obesity is a handicap and whether the individuals view themselves as impaired. The courts have generally found that obesity alone is not a handicap.<sup>88</sup> Additionally, unless the weight condition has interfered with or precluded adequate job performance, it has not been considered to be a qualified handicap.<sup>89</sup> The result of these cases is that an obese person will receive protection only if they have a medically-related or handicapping condition and are fully capable of performing the job.

The previous cases analyzed the facts of each case, comparing obesity to a handicap and asking whether or not job

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83. *Id.* at 221, 448 A.2d at 705.

84. *Id.* at 224, 448 A.2d at 707.

85. *Id.* at 225, 448 A.2d at 707.

86. *Id.* at 228, 448 A.2d at 708.

87. *Id.* at 227, 448 A.2d at 708.

88. See *Missouri Comm'n on Human Rights v. S.W. Bell Tel.*, 699 S.W.2d 75 (Mo. Ct. App. 1985) (Obesity alone not a handicap); *Krein v. Marian Manor Nursing Home*, 415 N.W.2d 793 (N.D. 1987) (merely being overweight is not a handicap, especially when plaintiff does not consider the weight a handicap).

89. See *Velger v. Williams*, 118 A.D.2d 1037, 500 N.Y.S.2d 411 (1986); *Missouri Comm'n*, 699 S.W.2d 75 (Mo. Ct. App. 1985).

performance was impaired. *Tudyman v. United Airlines* provided a unique approach to the subject of obesity as a handicap. A male job applicant who weighed more than the airline's guideline for flight attendants was denied employment.<sup>90</sup> His weight resulted from body building causing his muscle bulk to weigh more than fat or other tissue. The airline's weight requirements were motivated by a desire to project a positive image to customers. The major factor in *Tudyman* was that the applicant's weight was self-imposed and totally voluntary. He was not impaired in any way, and he was not considered to be handicapped under the Rehabilitation Act of 1973.<sup>91</sup>

As in *Philadelphia Electric Co.*, the *Tudyman* court stated that employers are free to be arbitrary and can generally hire as they wish as long as they do not discriminate on any basis that has been legislatively or judicially prohibited.<sup>92</sup>

## 2. Cases Holding That Obesity is a Handicap

Few cases have analyzed obesity and found that it, alone, is a handicap. One case which examined obesity, absent other medical or handicapping conditions, was *State Div. of Human Rights v. Xerox Corp.*<sup>93</sup> In *Xerox*, the claimant was a five foot six inch tall female weighing 249 pounds. She received an offer of employment as a Senior Business Systems Consultant, contingent upon satisfactorily passing a pre-employment medical examination. The report based on the medical examination indicated that she was obese. No other physical problems were noted on the report. Xerox then rescinded the employment offer because the applicant had failed the pre-employment medical examination.<sup>94</sup>

Xerox did not dispute that the plaintiff was qualified for the position. They also acknowledged that her obese condition was not related to her ability to perform the duties involved in the job.<sup>95</sup> The company's contention was essential-

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90. 608 F. Supp. 739 (C.D. Cal. 1984).

91. *Id.* at 746.

92. *Id.* at 747.

93. 102 A.D.2d 543, 478 N.Y.S.2d 982 (1984), *aff'd*, 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985).

94. *See id.* at 544, 478 N.Y.S.2d at 983.

95. *Id.*

ly that the obese group would be more costly because "over the long term the obese group [would] have a higher absenteeism rate, higher utilization rate of long-term and disability benefits, medical care plans, [and] life insurance."<sup>96</sup> The plaintiff claimed that this was unlawful discrimination under New York State laws.<sup>97</sup>

The court held that the gross obesity alone was a physical or medical impairment as defined by the statute. The court further stated that the obesity prevented the exercise of normal bodily function<sup>98</sup> and that "it [was] an accepted fact that obesity limit[ed] one's physical agility and endurance."<sup>99</sup> The court concluded that the obesity was a medical impairment, as well as a physical impairment. The court also stated that the New York Legislature had mandated that the statute be liberally interpreted to accomplish its purpose.<sup>100</sup>

One year later, this decision came before the Court of Appeals of New York.<sup>101</sup> The court agreed with the Appellate Division in finding that the plaintiff had been discriminated against. The court expanded on the lower court's reasoning in holding that since the New York statute would protect an obese person who also had high blood pressure, the statute should be construed to protect an obese person who had no other medical conditions or impairments.<sup>102</sup> The court also held that "employment [could] not be denied because of any actual or perceived undesirable effect the person's employment [might] have on disability or life insurance programs."<sup>103</sup> The court stated that the statute protects all persons with disabilities and not just those with hopeless or immutable disabilities.<sup>104</sup>

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96. *Id.* at 545, 478 N.Y.S.2d at 984.

97. *Id.* at 546, 478 N.Y.S.2d at 984 (Plaintiff argued that New York's Executive Laws protected her from discrimination based on a handicap or disability).

98. *Id.* at 548, 478 N.Y.S.2d at 985.

99. *Id.*

100. *Id.* at 550, 478 N.Y.S.2d at 986.

101. *State Div. of Human Rights v. Xerox Corp.*, 65 N.Y.2d 213, 480 N.E.2d 695, 491 N.Y.S.2d 106 (1985).

102. *Id.* at 217, 480 N.E.2d at 697, 491 N.Y.S.2d at 108.

103. *Id.* at 218, 480 N.E.2d at 697, 491 N.Y.S.2d at 108.

104. *Id.* at 219, 480 N.E.2d at 698, 491 N.Y.S.2d at 110.



### 3. *Cases not Considering Handicap When Examining Discrimination Based on Obesity*

Some early cases did not look at obesity as a handicap nor whether the obesity itself was the basis for a negative employment related decision. The courts simply determined whether or not there was a legitimate reason to support the discrimination. In a Florida case, *Metropolitan Dade County v. Wolf*,<sup>105</sup> an overweight employee was a recently hired probationary individual employed by the county fire department in a non-firefighting capacity. She was dismissed from her job because she was fifty-three pounds over the county's weight regulation. The court held that there was "reasonable basis to conclude that one who is obese or overweight, as for other health conditions, is thereby more likely to become disabled during employment."<sup>106</sup> Based on this belief, the court held that the weight requirement was a legitimate business necessity.

Another case, in Kentucky, included some police recruits who claimed that they had been denied employment because of their obesity. The federal court held, in *Louisville Black Police, Etc. v. City of Louisville*,<sup>107</sup> that the potential police recruits were rejected because they had failed legitimate physical and stress tests rather than because of their obesity. The court noted that although strict height and weight requirements have been found discriminatory, the physical and stress tests used by the City were not overly demanding.<sup>108</sup> Failure to pass the test was a valid business reason for denying employment.

A final case discussing obesity contains no discussion of a handicap or disability question. *Blodgett v. Board of Trustees, Tamalpais U.H.S. Dist.*<sup>109</sup> involved an obese female who taught girls' physical education as a probationary teacher. The plaintiff was denied a contract renewal because her employer believed that her overweight condition prevented her

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105. 274 So. 2d 584 (Fla. Dist. Ct. App. 1973), *cert. denied*, 414 U.S. 1116 (1973).

106. *See id.* at 585.

107. 511 F. Supp. 825 (W.D. Ky. 1979).

108. *Id.* at 840-41.

109. 20 Cal. App. 3d 183, 97 Cal. Rptr. 406 (1971).

from demonstrating necessary aspects of physical education. The court noted that it was unnecessary for a physical education teacher to excel during demonstration to be an effective teacher.<sup>110</sup> The condition was also perceived, by her employer, as preventing her from being an effective role model for the girls that she taught. The court noted that obesity does not inspire emulation,<sup>111</sup> and held, without discussing handicap at all, that the plaintiff's weight did not significantly impair her ability to teach physical education and that she should not be denied a contract renewal.<sup>112</sup>

### III. IDENTIFICATION OF THE PROBLEM

Obese persons are regularly discriminated against in employment related decisions. There is clear inconsistency among the federal and state laws regarding the treatment of overweight persons. Also court cases are not in harmony about whether obesity constitutes a physical handicap. Courts generally find that a handicap does not exist unless there are other conditions present. In addition, the handicap must either be related to the job or the person sufficiently able to perform the job for the handicap to be considered a qualified handicap.

While courts appear to be split on whether obesity, alone, should be considered a handicap, some have stated that an obese person who is perceived to be handicapped by an employer will be considered to have a physical impairment. This question should be settled by more definitive legislation.

If obesity, in and of itself, is not a handicap, a second question must then be addressed. Should obesity be protected by federal and state civil rights laws?

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110. *Id.* at 191, 97 Cal. Rptr. at 411.

111. *Id.* at 192, 97 Cal. Rptr. at 412.

112. *Id.* at 190, 97 Cal. Rptr. at 411 (this case is specifically brought under California Education codes which provide for a mandamus procedure to require reemployment when a person has been denied reemployment).

## IV. ANALYSIS

A. *Obesity as a Handicap*

The initial question for analysis is whether or not obesity qualifies as a handicap. The statement of purpose in the federal Rehabilitation Act of 1973 does not mention obesity or weight. The Act appears to address persons who are handicapped and in need of some form of rehabilitation. It does not appear to address persons who do not need rehabilitative services or who are able to perform applicable job functions adequately without accommodations.

The first purpose listed in the Act is to provide rehabilitation service to benefit handicapped persons, especially those with the most severe handicaps;<sup>113</sup> the goal is to ready these individuals for employment. Another reason for the act is to promote and expand employment opportunities for handicapped persons.<sup>114</sup> This applies to both governmental employment as well as private sector employment. Other reasons for the Act include the development of state of the art rehabilitation techniques, increasing the number and training of rehabilitation personnel, and analysis of physical barriers faced by handicapped persons.<sup>115</sup> One of the difficulties in applying this law to obese persons is that they are not necessarily helped by the remedies provided by the Act. It seems reasonable to assume that most overweight individuals do not need rehabilitation or special employer accommodations in order to perform the job duties associated with the jobs for which they are qualified.

Looking at the definitions of handicap, obese individuals who are otherwise healthy would not be considered handicapped under the first two federal definitions of handicap. They do not have a physical or mental impairment and they do not have a record of such impairment. This may be less true of morbidly obese persons than of those who are significantly obese. However, assuming that they are otherwise healthy, morbidly obese persons probably do not suffer from

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113. See generally Pub. L. NO. 93-112, 87 Stat. 355, 357 (codified at 29 U.S.C. §§ 701-774 (1982 & Supp. V 1988)).

114. *Id.*

115. *Id.*

significant physical or mental impairment relating to employment responsibilities.

Whether an obese person is considered handicapped because they are regarded, by an employer, as having a physical or mental impairment would be a fact specific determination. However, as a general rule, employers probably do not automatically regard a person as being handicapped merely because they are overweight or obese. More likely, an employer would view an obese person as an above-average user of various insurance programs, rather than as a handicapped employee. Additionally, where persons are simply overweight rather than obese, employment discrimination is more likely to be based on appearance than on a perceived handicap.

State legislation is generally similar to the federal law in defining handicap. California's definition, for example, includes physical or mental conditions that do not limit major life activity but are perceived by the employer as substantially limiting major life activities.<sup>116</sup> This definition also includes perceived conditions that may develop into a physical handicap that substantially limit major life activities.<sup>117</sup> Questionable is whether employers believe that overweight individuals have limited or potentially limited life activities simply because of the obese condition. It is more likely that employers believe that obese persons are less productive, more costly, slower, or less attractive—a fact specific determination in each case.

The courts have been reluctant to hold that obesity is a handicap. Only the New York court, in *Xerox*, held that obesity was a physical or medical impairment within the meaning of the state statute.<sup>118</sup> Other courts have not been willing to hold that obesity alone is a handicap. When obesity is not accompanied by other medical or physical conditions, the courts tend to define handicap narrowly, such that the overweight condition does not constitute a handicap.

Neither federal and state legislation nor judicial decisions readily classify obesity as a handicap. It appears to stretch the definition of handicap to include someone who is in good health and able to perform job functions satisfactorily,

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116. CAL. ADMIN. CODE tit. 2, § 7293.6(h)(3) (1988).

117. *Id.* § 7293.6(h)(4).

118. *Xerox*, 102 A.D.2d at 548, 478 N.Y.S.2d at 984.

but is overweight. The first two levels of obesity, overweight and significant obesity, do not appear to adversely affect performance. Even morbid obesity does not, by itself, necessarily have a negative impact on an individual's job performance. Additionally, most overweight persons would not consider themselves to be handicapped under common notions, definitions and perceptions of the term handicapped. The self-perception of being handicapped, for many obese persons, probably occurs while searching for a remedy after discrimination has occurred.

The implications of holding that obesity, *per se*, is a handicap are numerous. Such a finding means that many employers who are classified as government contractors would be required to include weight as a factor in analyzing their selection and hiring processes and in their affirmative action programs.<sup>119</sup> Additionally, employers might be required to make workplace adjustments and accommodations to assist hiring, promoting or transferring obese persons.<sup>120</sup> Although the present application of these rules is limited to government contractors, the Americans with Disabilities Act was extended to cover the private sector. The Act contains many of the same definitions as in the Rehabilitation Act, however, it excludes obesity as a protected classification.<sup>121</sup>

Some positive implications have occurred in finding that obesity is a handicap. Initially, it would make it unlawful for an employer, who is covered by applicable legislation, to use weight as a factor in the hiring process, assuming that the obese individual can adequately perform the job after reasonable accommodations have been made by the employer. Although this may sound attractive, loopholes remain. A finding of discrimination based on obesity will generally be very fact specific and a determination of reasonable accommodation will be required in each case. This means that although

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119. The Federal Rehabilitation Act applies to employers who enter into contracts with any Federal department or agency. *See* Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355, 393 (codified as amended at 29 U.S.C. § 793 (1982 & Supp. V 1988)).

120. The Act requires that reasonable accommodation to known limitations be made unless it would pose an undue hardship on the employer. 45 C.F.R. § 84.12 (1989).

121. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 330 (codified as 42 U.S.C.S. § 12101 (1990)).

discrimination based on obesity would be prohibited, each instance of such discrimination would necessitate litigation in order to determine if the obesity was the reason for the employment related decision.

Preventing employment related discrimination against obese persons is a desirable goal. Holding that all obese persons are handicapped or disabled does not effectively accomplish such a goal. The burden of proving that the obesity was a hiring factor, that it impaired job performance and that the employer could have made reasonable accommodations would be an onerous one and would be required in each instance.

*B. Protection from Weight Discrimination as a Matter of Right*

Assuming that the objective is to protect overweight individuals from experiencing employment related discrimination, our law should evolve to provide better protection than the narrow confines of handicap legislation. Additional arenas in which to view obesity discrimination include race, sex, smoking, and Acquired Immune Deficiency Syndrome (AIDS).

Initially, it might be argued that discrimination on the basis of obesity has a disparate impact on some minorities and on females.<sup>122</sup> Some minority groups and females have a greater propensity to be overweight than other races or males.<sup>123</sup> Conceivably, discrimination against overweight individuals subjects these groups to double discrimination. The intent of the employer in discriminating in this manner is no longer a concern. Supreme Court decisions have held that disparate impact analysis is appropriate whether the employer's discrimination was objective or subjective.<sup>124</sup> Thus, a plaintiff who can prove that subjective weight discrimination adversely impacts the race or sex grouping that

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122. Issues regarding the equal protection claims under the United States Constitution are beyond the scope of this comment. A holding favoring obese individuals would not protect those in the private sector unless the holding spurred legislative action.

123. See letter from William Bennett, M.D. to Senator Michael Schwarzwald (May 14, 1983).

124. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988); *Griggs v. Duke Power Co.* 401 U.S. 424 (1971).

the person belongs to will have a plausible cause of action.<sup>125</sup>

Obesity treatment in the workplace can also be compared to current opinions about smoking. Many employers have implemented no smoking policies and many governments at all levels are beginning to pass no smoking regulations. These employment policies and regulations were initially in response to complaints by customers and non-smoking employees that smoke interferes with a pleasing and healthful environment in which to work or do business. Employers, however, have begun to implement no smoking policies for some of the reasons that are used to justify not hiring obese persons, such as reducing health insurance cost and improving productivity. Some employers have gone beyond the typical smoking policy or ordinance and are refusing to hire individuals who smoke.<sup>126</sup> Although smokers have been increasingly more vocal about their own rights, employers have thus far not been chastised for controlling workplace smoke or denying employment to smokers.<sup>127</sup>

Some of the arguments that apply to smokers appear to be similar to those used in obesity cases urging a finding of handicap. The voluntary nature of smoking could be compared to that of obesity. Obesity, however, is not necessarily voluntary. Also, the alterability of smoking can be contrasted to that of obesity. While an obese person frequently can do little about the condition, smokers appear to be more amenable to change. Although long term smokers may deny an ability to stop smoking, it appears to be easier to quit smoking than to alter an obese condition. Additionally, smokers generally started smoking either voluntarily or in response to peer group pressure. This is clearly not the case with obese persons, who have little to say about being obese.

The potential cost of smokers and obese persons can also be compared. Employer concerns that smoking is harmful and increases health insurance costs are more valid than similar arguments about overweight individuals. It is also well

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125. No doubt the obese person who is not a member of any protected classification would be frustrated by such a holding.

126. See Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?*, 62 NOTRE DAME L. REV. 940 (1987).

127. *Id.*

documented that smoking increases the chance of medical disorder.<sup>128</sup> While medical disorders are prevalent among obese persons, an established cause and effect relationship does not exist between the obesity and the existing medical condition.<sup>129</sup> Therefore, while it may be acceptable to discriminate against smokers, the same reasons promulgating such acceptance do not apply to obese persons.

The protection of the obese may be similar to protections afforded to individuals with AIDS. AIDS victims, like persons afflicted with obesity, cannot be said to have acquired the affliction voluntarily, except possibly by choice of a particular life style. Also, the disease, at this point, is considered immutable.

It seems an easier task to classify AIDS as a handicap than obesity. In the case of an AIDS patient, as the disease progresses, an individual's ability to perform job functions will most likely diminish. Thus, the individual afflicted with AIDS will have a physical condition that more clearly affects job performance than an individual who is obese. Whether reasonable accommodations can be arranged to make the job more easily performed will generally be fact specific, however, AIDS victims will usually be found to be handicapped.<sup>130</sup> In addition, some local governments, such as San Francisco, have passed legislation specifically protecting AIDS victims.<sup>131</sup> The rationale for protecting AIDS victims appears to be quite similar to protecting obese persons; however, a finding of handicap is inadequate to obtain such protection for the obese.

Current laws at both the state and federal levels prohibit external factors such as race, sex, national origin, color, age, marital status, and religion from influencing employment related decisions. Michigan has led the nation in the realm of employee protection by including height and weight as prohibited forms of discrimination in its civil rights law,<sup>132</sup>

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128. *Id.* at 941-42.

129. Straw, *supra* note 38 at 122.

130. Comment, *Are AIDS Victims Handicapped?*, 31 ST. LOUIS U.L.J. 729 (1987); see also Note, *AIDS and Employment Discrimination: Should AIDS be Considered a Handicap?*, 33 WAYNE L. REV. 1095 (1987).

131. Comment, *Are AIDS Victims Handicapped?*, 31 ST. LOUIS U.L.J. 729, 747 (1987).

132. MICH. COMP. LAWS ANN. § 37.2102 (West 1979) (prohibiting discrimina-



and the District of Columbia has added personal appearance and sexual orientation to its list of proscribed discriminatory factors.<sup>133</sup> This appears to make more sense than attempting to prove that a handicap exists each time an obese person suffers from employment related discrimination. Looking at the categories that are currently protected in the majority of jurisdictions, classes, such as race, sex, national origin, color and age share many of the characteristics that accompany obesity. Among these factors, none can be said to be voluntary. Like obesity, one can do very little about membership in any of these groups.

Marital status and religion, on the other hand, are generally thought to be voluntary and can be altered at any time with few restrictions. If each of these groups are to be statutorily protected from discrimination, the same status should be given to obesity or weight.

One problem that occurs in protecting obesity or weight under civil rights laws is which levels of obesity should be protected. Viewing the three levels of obesity, significantly obese and morbidly obese persons clearly experience more prejudice than mildly overweight persons experience. Should legislation preclude simple overweight from protection?

The goal should be to exclude external factors as determinants in employment related decisions. A person's opportunity for employment, promotion or transfer should be determined by the individual's ability to perform the job adequately. This suggests that all forms of weight discrimination should be unlawful.

On the other hand, the goal could be to protect persons who have been traditionally discriminated against. If this is the case, the protection should be limited to those who are significantly obese or morbidly obese. This precludes simple overweight as a protected category because persons who are mildly overweight do not generally experience discrimination.

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tion based on religion, race, color, national origin, age, sex, height, weight and marital status.).

133. D.C. CODE ANN. § 1-2501 (1981 & Supp. 1989) (prohibiting discrimination based on race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, matriculation, political affiliation, physical handicap, source of income, place of residence and place of business). The D.C. code also states that this list is not all inclusive.

The logical conclusion from the foregoing discussion is that employees and employment applicants should be examined on their ability to perform the job rather than on any extraneous factor such as weight or obesity. These factors deserve the same protections as other currently protected civil rights.

## V. PROPOSAL

As the preceding analysis has stated, obese persons have experienced significant problems with employment related discrimination. It is unsatisfactory to attempt to prove in each case that overweight individuals are handicapped or disabled so that specific protective laws will apply. Additionally, courts have been inconsistent in determining which laws apply to obese persons.

Obesity can be closely associated with other protected classes such as race, sex, color, age or religion. Consequently, obesity should be afforded the same legislative protections that accompany being a member of a protected class.

State and federal law makers should follow the lead of Michigan and amend current civil rights laws to include protection against weight discrimination. This will improve the plight of many persons who are discriminated against solely because they are different than the norm by virtue of their weight. A broadly written statute would add weight to the existing list of protected classifications while a more narrowly drafted statute might limit the protection to obese persons or morbidly obese persons. In either case, it will remove one more meaningless factor that employers use to judge individual ability and job performance.<sup>134</sup>

## VI. CONCLUSION

This comment has examined the problem faced by up to twenty percent of the nation's population: obesity and its impact on employment. Clearly overweight persons experience employment related discrimination. Attacking the problem

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134. For example, the Civil Rights Act of 1964 could be amended to include weight among its protected classifications. Similarly, the California Government Code, specifically section 12940, could be amended to include weight among its protections.

through litigation based on handicap laws has proven ineffective and is not appropriate since obesity, unaccompanied by other physical or medical conditions, fails to satisfy the usual definitions of handicap or disability. Additionally, courts have been inconsistent in determining whether obesity should be considered a handicap.

Obesity is analogous to other protected classes and as such should be similarly protected. This comment recommends that the appropriate response to the problem is for state and federal legislative bodies to expand current civil rights laws to include weight or obesity as protected from discrimination.

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